

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0380

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|--------------------------------|---|-------------------------|
| MARK P. PARADISO |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| JAY FOSTER |) | |
| (Former attorney for claimant) |) | |
| |) | |
| Respondent |) | |
| |) | DATE ISSUED: 02/26/2019 |
| v. |) | |
| |) | |
| HUNTINGTON INGALLS |) | |
| INCORPORATED - PASCAGOULA |) | |
| OPERATIONS |) | |
| |) | |
| Self-Insured |) | |
| Employer-Petitioner |) | DECISION and ORDER |

Appeal of the Compensation Order Award of Attorney’s Fees of David A. Duhon, District Director, United States Department of Labor.

Jay Foster (Law Office of Jay Foster), Ocean Springs, Mississippi.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney’s Fees (OWCP No. 07-307422) of District Director David A. Duhon rendered on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The fee award of the district director must be affirmed unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant, through his initial attorney Jay Foster, filed a claim against employer on January 27, 2016, for a work-related back injury he sustained on December 10, 2015. EX 2. Mr. Foster obtained favorable recommendations for claimant at informal conferences held on July 15 and November 16, 2016. EX 4. Employer controverted the claims examiner's recommendations. EX 5. On April 5 and 6, 2017, respectively, claimant terminated Mr. Foster and hired Sue Esther Dulin who "re-filed" claimant's claim and thereafter represented him through the issuance of Administrative Law Judge Price's Decision and Order Approving Compromise Settlement on December 7, 2017. EXs 6, 7. Under the terms of the agreement, employer paid claimant \$100,000 in full settlement of his claim for disability and medical benefits, as well as "a reasonable and necessary attorney's fee" of \$15,000 to Ms. Dulin. EXs 12-14.

On February 5, 2018, Mr. Foster filed a fee petition for work performed before the district director requesting \$15,203.25 for services performed from January 15, 2016 to April 5, 2017, as well as for the preparation of his fee petition in February 2018. EX 16. Employer, and Ms. Dulin for claimant, objected to Mr. Foster's fee petition. The district director awarded Mr. Foster a fee payable by employer totaling \$13,860, for work performed before the district director.¹

Employer appeals the district director's fee award, and Mr. Foster responds, urging affirmance. Claimant has not responded to the appeal.

Employer first contends that Mr. Foster's fee petition was not timely filed. We reject this contention. Neither the Act nor the regulations governing fee petitions before the district director specifies a time period for filing a fee petition. 33 U.S.C. §928; 20 C.F.R. §702.132; *see Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). Section 702.132(a) states that a "fee application shall be filed and serviced upon the other parties within the time limits specified by [the] district director [or] administrative law judge" before whom the services were performed. A district director thus possesses the discretion

¹The district director rejected all time claimed prior to February 10, 2016, the date employer received notice of the claim, and awarded Mr. Foster 46.2 hours at his requested hourly rate of \$300.

to set time limits for the submission of a fee request. *See generally Bankes v. Director, OWCP*, 765 F.2d 81, 82 (6th Cir. 1985).

In this case, no deadline was imposed.² The district director, addressing employer's timeliness objection, stated "[t]here is no time limit for the submission of a fee lien in this case." Compensation Order at 2. Moreover, Mr. Foster's fee petition was filed less than two months after the administrative law judge approved the parties' settlement agreement and claimant's success was established. Employer has not established that the district director abused his discretion in addressing Mr. Foster's fee petition. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Employer next contends that the district director erred in assessing liability against it for Mr. Foster's fee. In this respect, employer first avers that Mr. Foster's work had nothing to do with the successful prosecution of claimant's claim and thus he is not entitled to an attorney's fee.

Pursuant to Section 28(a), an employer is liable for a claimant's attorney's fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in a successful prosecution of the claim. 33 U.S.C. §928(a);³ *see Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116 (CRT) (5th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109 (CRT) (5th Cir.

²Contrary to employer's contention, the excusable neglect standard is inapplicable in this case. *See Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 387 (1993).

³Section 28(a), 33 U.S.C. §928(a), provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the [district director], Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

2001). In this case, employer does not contest the district director's finding that it did not pay any benefits within 30 days of its receipt of the claim on or about January 28, 2016.

Moreover, we reject employer's contention that Mr. Foster's services did not contribute to claimant's successful prosecution. Although claimant discharged Mr. Foster prior to entering into the settlement agreement with employer, the ultimate success by a claimant entitles his attorney to a fee for all necessary work performed leading to that success. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (en banc). Thus, the discharge of an attorney prior to a settlement agreement does not necessarily render the work of that attorney non-compensable.⁴ Rather, the inquiry concerns whether the attorney's services were necessary to establish the elements of the successful claim.

In this case, the district director found that Mr. Foster's work for claimant yielded two successful informal conference recommendations which were similar to the recommendations subsequently procured by Ms. Dulin.⁵ Comp. Order at 3. Employer has not established an abuse of the district director's discretion in finding that Mr. Foster's work contributed to claimant's ultimate success. Therefore, we reject employer's contention that Mr. Foster is not entitled to a fee on the ground that his work did not contribute to claimant's successful prosecution of his claim.

Employer next contends the parties' settlement agreement precludes its liability for Mr. Foster's fee. The settlement agreement signed on November 16, 2017, and approved by Judge Price on December 7, 2017, makes no mention of Mr. Foster.⁶ The Settlement Agreement states:

⁴The district director stated Mr. Foster's "work on the case cannot be considered totally unsuccessful just because he was terminated by the claimant prior to the case ultimately settling." Comp. Order at 2-3.

⁵The informal conference at which Ms. Dulin represented claimant resulted in, among other things, a recommendation that "[t]he 11/16/2016 Informal Conference Recommendation [procured by Mr. Foster] remains in effect." EX 9.

⁶The agreement provides that: "[a] reasonable and necessary attorney's fee payable by Employer to be itemized and submitted by the Claimant's attorney, Sue Esther Dulin, to the Administrative Law Judge for approval, said fee not to exceed the sum of \$15,000 . . ." EX 14. Judge Price, in his December 7, 2017 Decision and Order Approving Compromise Settlement, stated that pursuant to the parties' agreement, "employer shall pay to the Claimant's attorney, Sue Esther Dulin, the sum of \$15,000.00 as a reasonable attorney's fee in this matter."

That upon final payment of this agreement and the Order of the Administrative Law Judge, Claimant shall fully acquit and discharge said Employer . . . from any and all claims, demands and liability for disability benefits, loss of wage earning capacity or any other amounts Employer could be held to owe except [medical benefits] Further, the Claimant . . . agrees and covenants to indemnify and hold harmless the Employer herein . . . against any claims of any type or nature by any person arising out of the aforesaid injury.

Settlement Agreement at p. 5 Number 16. In addition, the Agreement states:

Claimant is authorized and empowered to execute any receipt, release, or other instruments required by the said Employer to evidence its release, acquittal, and discharge herein, and to operate as a full accord and satisfaction of any and all compensation and medical benefits which may be due to the Claimant [as a result of the agreement].

Id. at p. 7. On December 15, 2017, claimant executed an “Absolute Release” which purported to “extinguish[] any and all claims, demands or causes of action, known and unknown, against [employer] including, . . . attorney’s fees, court costs, and compensation of every kind (collectively ‘claims’).” EX 15. We reject employer’s contention that these documents extinguish its liability for Mr. Foster’s fee.

Section 8(i) of the Act, 33 U.S.C. §908(i), provides that the parties may settle “any claim for compensation under this chapter.” Where a claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act’s implementing regulations, must be followed.⁷ *See, e.g., Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); 20 C.F.R. §§702.241-702.243. The implementing regulations state that “the settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file.” 20 C.F.R. §702.242(a); *see generally Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff’d on recon. en banc*, 27 BRBS 33 (1993) (Brown, J. dissenting). The regulations require that the settlement application contain “[a] full description of the terms

⁷Section 8(i), 33 U.S.C. §908(i), is the only means for compromising an employer’s obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) (“No agreement by an employee to waive his right to compensation under this chapter shall be valid”), and to Section 16, 33 U.S.C. §916 (no assignment, release, or commutation of compensation or benefits is valid except as provided in the Act).

of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by §702.132." 20 C.F.R. §702.242(b)(1).⁸ Thus, the parties may include a fee for the claimant's attorney in their settlement agreement, *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.132(c), and any fee agreement in the settlement is deemed approved upon approval of the settlement. 20 C.F.R. §702.132(c). Once approved, the effect of a Section 8(i) settlement is to completely discharge the employer's liability for the claimant's injuries that are the subject of the settlement. 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *see, e.g., Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998). However, an employer's liability for an attorney's fee is not relieved unless the settlement agreement explicitly states so. *See* 20 C.F.R. §§702.242(b)(1); 702.132(c); *see generally Losacano*, 48 BRBS 49.

In this case, the fully-executed and approved settlement application, by its own terms, released employer from liability for disability and medical benefits once it paid the agreed amount. *See* 33 U.S.C. §908(i)(3) ("A settlement approved under this section shall discharge the liability of the employer or carrier, or both."). Thus, the authorization that claimant could execute a release to acknowledge the settlement was superfluous.

In addition, although the settlement agreement states that claimant agrees "to indemnify and hold harmless" employer "against any claims of any type or nature by any person arising out of the [work] injury," the subsequently executed "Absolute Release" purports to release employer from liability for any attorney's fee, which goes beyond the settlement agreement itself. Specifically, the settlement agreement did not state that claimant agreed to pay an attorney's fee to Mr. Foster. Employer is attempting to use the subsequent release to extinguish its liability for such a fee. But the release was not integrated into the approved settlement, and would diminish claimant's recovery of \$95,000 for disability and \$5,000 for future medical benefits without the approval of the administrative law judge, contrary to the Act's fee-shifting mechanism. *See* 33 U.S.C. §928(a). The provisions of the Absolute Release that purport to release employer from liability for claims that are not delineated in the settlement agreement itself are contrary to the Act, and thus cannot be enforced. 33 U.S.C. §916; *see n.6, supra*; *see generally Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010). Indeed, the district director

⁸Additionally, Section 702.241(e), 20 C.F.R. §702.241(e), states:

A fee for representation which is included in an agreement that is approved in the manner described in paragraph (d) of this section, shall also be considered approved within the meaning of Section 28(e) of the Act, 33 U.S.C. §928(e).

properly stated that “Any such release is not acceptable in Longshore cases and the ALJ’s order does not approve such a finding.” Comp. Order at 2. Therefore, we reject employer’s contention that the December 15, 2017 Absolute Release precludes its liability for Mr. Foster’s attorney’s fees.

Employer has not established that the fee award is contrary to law or that the district director abused his discretion in this matter. We, therefore, affirm the district director’s award of an attorney’s fee totaling \$13,860,⁹ payable by employer, to Mr. Foster for work performed before the district director in this case. *See* 33 U.S.C. §928(a); *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017).

Accordingly, the district director’s Compensation Order Award of Attorney’s Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁹The district director’s findings regarding the number of hours and hourly rate awarded Mr. Foster are affirmed as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).